

**The Riverboat Hotel and International Union of Operating Engineers, Stationary Engineers, Local 39, AFL-CIO.** Case 32-CA-14418

September 29, 1995

**DECISION AND ORDER**

BY MEMBERS BROWNING, COHEN, AND  
TRUESDALE

On May 18, 1995, Administrative Law Judge Frederick C. Herzog issued a bench decision and on June 8, 1995, he issued the attached bench decision and supplement, order correcting transcript, and certification. The Respondent filed exceptions and a supporting brief, the Charging Party filed a cross-exception, and the General Counsel and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.<sup>2</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, the Riverboat Hotel, Reno, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup>We grant the General Counsel's request to strike from the Respondent's brief evidence not contained in the record, pursuant to Sec. 102.46 of the Board's Rules and Regulations.

<sup>2</sup>We deny, on the merits, the Charging Party's exception to the judge's failure to require that the remedial notice be mailed to employees.

*George Velasteagui, Esq.*, for the General Counsel.  
*Gregory Kamer, Esq. (Kamer & Ricciardi)*, of Las Vegas, Nevada, for the Respondent.  
*Bill Sokol, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld)*, of Oakland, California, for the Charging Party.

**BENCH DECISION AND SUPPLEMENT, ORDER  
CORRECTING TRANSCRIPT, AND  
CERTIFICATION**

FREDERICK C. HERZOG, Administrative Law Judge. This matter was heard before me in Reno, Nevada, on May 18, 1995. At the close of the hearing, I delivered a bench decision, pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, which found that the Respondent has engaged in certain unfair labor practices.

The portion of the trial transcript which contains my bench decision, including my Findings of Fact, Conclusions of Law, Order and Notice to Employees, is attached hereto as Appendix A. Also attached, as Appendix B [omitted from

publication], Appendix C, and Appendix D, respectively, are my order correcting transcript, my supplement to bench decision, and the revised Notice to Employees, all of even date.

In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of the pertinent portion of the trial transcript and that the transcript pages constitute my decision here.

**APPENDIX A**

**[Excerpts from the transcript.]**

*Page 138 at line 18 through page 145 at line 24:*

18 At this time I will be issuing a bench decision pursuant  
19 to Section 102.35(b)(10) of the Board's rules and  
20 regulations.  
21 I will receive a transcript of this case, as is usual,  
22 ten days after this trial closes. At that time I will  
23 certify those pages of the transcript which contain my  
24 decision which I am announcing at this time and I will issue  
25 an order then which contains the notice in written form.

139

1 Obviously just to read the notice is not going to help  
2 you very much. So there will be a notice at that time that  
3 will be attached to the certification. And if I find that  
4 there are some other matters that I have overlooked or which  
5 should appropriately be covered or have neglected to set  
6 forth as a finding of fact and conclusion of law I'll  
7 include those. That doesn't mean I'm going to change my  
8 decision. I'm confident of the decision that I have reached  
9 in this case. But it does mean that if there is something  
10 that I've left out I will include it at that time.  
11 Now, the complaint here has two allegations of  
12 violations. The first is that respondent at material times  
13 preceding the issuance of the complaint here maintained and  
14 enforced a set of employee rules embodied in the employee  
15 operation handbook, also known as the handbook, governing the  
16 employees' conduct. Among those rules was a rule entitled  
17 the "No Solicitation Rule."  
18 As the parties have correctly identified and have  
19 stipulated in the record, the rule which is set forth in the  
20 complaint, and which is also set forth in Joint Exhibit 1,  
21 is illegal on its face. The reason for the illegality is  
22 that under the law employees have a right to communicate  
23 with one another concerning their views with respect to any  
24 number of things, but the one with which we're particularly  
25 concerned with in this particular case is their views about

140

1 whether it's a good idea or a bad idea or a neutral idea to  
2 have a union or whether to engage in or join with one  
3 another in some activity for mutual aid or protection.  
4 The Supreme Court has decided many, many years ago that  
5 there is no more appropriate place for the exchange of those  
6 ideas about what the work place shall be than in the work  
7 place itself. Where else would employees more naturally  
8 speak to one another about what's to be done in the work  
9 place than at the work place?  
10 That generally goes back to a case called Republic  
11 Aviation, but there's any number of cases that have been  
12 decided since then, and the line of cases we were talking  
13 about earlier today, including TRW and Our Way and cases  
14 that I will supply the citations for at the time I issue my  
15 certification, in general language provides that if an  
16 employer makes a rule and applies it to employees so that it  
17 forbids employees from engaging in such interaction and the  
18 rule is so broad as to prohibit that interaction, that rule  
19 is presumptively invalid on its face.  
20 As the counsel for both sides have conceded here, this  
21 —the written wording of this rule obviously falls within  
22 that prohibition. You can't have a rule that is this broad,  
23 as was done up until this past December.  
24 Now, counsel for respondent urges me to find that the  
25 rule, if it was defective, became appropriate and lawful

141

1 following the time when it was amended in December 1994.  
 2 And I do find, as a matter of fact, that the rule, in fact,  
 3 was amended at that time. However, I do not find that the  
 4 rule was amended in such a way as to obviate the necessity  
 5 for a remedy, unlike the decisions in some of the cases that  
 6 were cited to me here and which I mentioned earlier, such as  
 7 Broyhill, such as Kawasaki Motors, again, cases that I will  
 8 cite the—give the full citations when I issue my  
 9 certification.  
 10 The Board requires that if employees are truly to be  
 11 assured of their rights under the Act they have to be given  
 12 some assurance that an employer recognizes that there has  
 13 been a violation of those rights and they have to be given  
 14 some assurance against future violations of the Act. Here  
 15 the notice merely recites what the new rule does. It  
 16 doesn't say a thing about any employer recognizing that a  
 17 violation of employee rights had occurred or giving the  
 18 employees any assurance against its recurrence.  
 19 So I do not find that the employer's argument which—  
 20 laudable as it may be—and I do applaud any employer that  
 21 seeks to rectify any violation of the Act that it comes  
 22 upon. I'm sure Mr. Velastegui will join with me in this,  
 23 that when an employer attempts to write something that's to  
 24 be applauded. But from a technical standpoint I have to  
 25 tell you that you didn't go far enough and you didn't give

142

1 employees sufficient assurance.  
 2 So I'm going to require the employer to post a notice to  
 3 its employees saying that it will revoke and rescind the  
 4 rule which it has already revoked and rescinded, but I'm  
 5 going to require that so that the employees may have an  
 6 assurance when the notice goes on the bulletin board that  
 7 their rights are protected and they understand whereby the  
 8 whole thing came about that their rights got protected and  
 9 how it happened and assurance that it will never happen  
 10 again because now the U.S. government will do something  
 11 about it if it does happen again.  
 12 Now, that's essentially my decision with respect to the  
 13 solicitation issue.  
 14 The second issue is to—is as to whether or not a  
 15 threat was made, because that's essentially what the  
 16 statement about the divorce amounts to.  
 17 Mr. Stephens has testified here that while he worked at  
 18 the Riverboat, and shortly after the election here, that Mr.  
 19 Marlin, an admitted supervisor and management official of  
 20 the respondent, made a statement to him along the lines of  
 21 —that indicated that Mr. Marlin thought of the results of  
 22 the election, which the union had won by a vote of eight to  
 23 two in a ten-person unit, as indicating that the employees  
 24 had chosen to put themselves in a different place from the  
 25 employer, that is—the euphemism was used, "Get a

143

1 divorce," and that thereafter the employees had better watch  
 2 themselves because the employer's agents would be watching  
 3 on the employer's behalf.  
 4 Now, you should understand that it is illegal for an  
 5 employer's agents to engage in that sort of activity. An  
 6 employer which starts engaging in activity of—the  
 7 activity of watchful waiting, waiting for an employee to  
 8 slip up, make the slightest violation of company policy or  
 9 rules just to give an employer an excuse to take retribution  
 10 action against the employee, has violated the law.  
 11 The employer—that's one of the worst things that an  
 12 employer could do under the National Labor Relations Act,  
 13 and if they do it they will be severely sanctioned for it  
 14 and if they don't do it but merely threaten to do it they  
 15 will be sanctioned. You can cite cases such as Lipman  
 16 Brothers at 355 Federal 2nd, page 15, local citation 21.  
 17 That's a First Circuit case of 1966.  
 18 But here the—so there's no question in my mind that  
 19 had that—that if that statement was made by Mr. Marlin to

20 Mr. Stephens and others, such as Mr. Cibula, Mr. Young and  
 21 someone named Jerry, that that would constitute a violation.  
 22 So the only question that I have to decide about that  
 23 statement is did it occur. And the only way I can decide  
 24 whether or not it occurred is to determine which version of  
 25 the testimony I credit.

144

1 Mr. Stephens' version of that testimony has already been  
 2 recited by me. Mr. Cibula has come up and I think credibly  
 3 testified that there was no such conversation, and obviously  
 4 therefore that he can't recall something that didn't happen.  
 5 Mr. LeJeune testified essentially to the same thing.  
 6 To be sure, there are certain factors that go to  
 7 weighing the credibility of these witnesses and may affect  
 8 or demonstrate some bias on the parts of witnesses. For  
 9 example, Mr. Stephens has been discharged. Normally that's  
 10 one thing we would take into account, and I do take it into  
 11 account here in weighing his credibility. Normally people  
 12 who are discharged have less than tender feelings toward  
 13 those who have discharged them, whether they think it's  
 14 right or wrong. Mr. Stephens, to his credit, candidly  
 15 confessed that he doesn't think it's right that he got  
 16 discharged.  
 17 Additionally, I notice that Mr. Cibula and Mr. LeJeune  
 18 both were free to admit that they're being paid for their  
 19 time here, both admit that they're still on the payroll.  
 20 Those are factors which all weigh in favor of lessened  
 21 credibility when they're testifying on behalf of an  
 22 employer.  
 23 But nonetheless I must say that the thing that has  
 24 caused me to reach the conclusion that I have here, and it's  
 25 because I have to reach a conclusion—I can only reach a

145

1 credibility determination that favors one or the other in  
 2 such a clearcut and simple fact pattern as this. I don't  
 3 know in my heart which of these witnesses is either truthful  
 4 or entirely accurate because both of those factors can be  
 5 involved here.  
 6 But I have determined, because of the fact that there  
 7 are witnesses who were claimed to be present by the person  
 8 who propounded this statement, that is Mr. Stephens  
 9 specifically recalling that Mr. Cibula, Mr. Tim Young and  
 10 this other employee named Jerry would be there. In other  
 11 words, as I indicated, at least three other persons were  
 12 present. And at least one of those persons had to be, given  
 13 the arithmetic of the vote, one of those people had to be a  
 14 union adherent.  
 15 In other words, as I see it, if this—in order for me  
 16 to credit this testimony, it would reasonably be inferred in  
 17 my mind that one other person would have stepped forward to  
 18 corroborate this testimony had it occurred, because at least  
 19 one of the three people there was a union adherent.  
 20 So while I hesitate to discredit people, and I certainly  
 21 don't want to be understood as calling anyone a liar, I have  
 22 determined to discredit the testimony of Mr. Stephens in  
 23 this regard and to dismiss that allegation of the complaint.  
 24 That concludes my decision.

...  
 And page 148 at lines 3 through 13:

3 JUDGE HERZOG: Oh. Let me put it this way, I apologize  
 4 if that was unclear, but my—the extent of my ruling is  
 5 this. They're going—the employer is required to revoke  
 6 and rescind their outstanding no solicitation/no  
 7 distribution clause, their rule about that. Now, it's up to  
 8 them whether they want to have a policy. But when they get  
 9 through doing that they won't have a policy, period. It's  
 10 up to them whether they want to have the policy. That's an  
 11 entirely lawful thing for them to do to have such a policy  
 12 or not have one, but when they do do it they have to do it  
 13 lawfully.

...  
 And page 165 at line 6 through page 170, at line 21:

6 JUDGE HERZOG: Very well. When my decision issues it  
 7 will read as follows.

8 My conclusions of law are:  
 9 1) Respondent is an employer engaged in commerce within  
 10 the meaning of Section 22, 6 and 7 of the Act;  
 11 2) The union is a labor organization within the meaning  
 12 of Section 25 of the Act;  
 13 3) Respondent violated Section 8(a)(1) of the Act by  
 14 promulgating and maintaining an overly broad no  
 15 solicitation/no distribution rule;  
 16 4) The above unfair labor practice has an effect upon  
 17 commerce as defined in the Act;  
 18 And 5) Respondent did not violate the Act in any other  
 19 respect.  
 20 The remedy is, having found that the respondent has  
 21 engaged in certain unfair labor practices, I find that it  
 22 must be ordered to cease and desist and to take certain  
 23 affirmative action designed to effectuate the policies of  
 24 the Act.  
 25 Having found that respondent promulgated and maintained

166

1 an overly broad no solicitation/no distribution rule, it  
 2 shall be required that respondent rescind the rule and  
 3 notify all employees of its rescission.  
 4 On the basis of the foregoing findings of fact,  
 5 conclusions of law and the entire record, and pursuant to  
 6 Section 10(c) of the Act, I issue the following order:  
 7 The respondent, the Riverboat Hotel located in Reno,  
 8 Nevada, its officers, agents, successors and assigns, shall:  
 9 1) Cease and desist from a) restraining, coercing or  
 10 interfering with the exercise of rights guaranteed by  
 11 Section 7 of the Act by promulgating or publishing or  
 12 maintaining an overly broad rule against solicitation or  
 13 distribution by employees while on respondent's property; b)  
 14 in any like or related matter interfering with, restraining  
 15 or coercing employees in the exercise of the rights  
 16 guaranteed them by Section 7 of the Act;  
 17 2) Take the following affirmative actions necessary to  
 18 effectuate the policy of the Act: 1) Revoke and rescind its  
 19 rule and its employee operation handbook having to do with  
 20 solicitation and/or distribution; 2) Post at its facility in  
 21 Reno, Nevada, copies of the attached notice marked  
 22 "Appendix D." Copies of the notice on forms provided by the  
 23 Regional Director for Region 32, after being signed by the  
 24 respondent's authorized representatives, shall be posted by  
 25 the respondent immediately upon receipt and maintained for

167

1 60 consecutive days in conspicuous places, including all  
 2 places where notices to employees are customarily posted.  
 3 Reasonable steps shall be taken by the respondent to ensure  
 4 that the notices are not altered, defaced or covered by any  
 5 other material; 3) Notify the Regional Director in writing  
 6 within 20 days from the day of this order what steps the  
 7 respondent has taken to comply.  
 8 Date of my decision is May 18, 1995.  
 9 All outstanding motions inconsistent with this order are  
 10 hereby denied. In the event no exceptions are filed as  
 11 provided by Section 102.46 of the rules and regulations of  
 12 the National Labor Relations Board, the findings,  
 13 conclusions and recommended order herein shall, as provided  
 14 in Section 102.48 of the rules and regulations, be adopted  
 15 by the Board and become its findings, conclusions and order  
 16 and all objections thereto shall be deemed waived for all  
 17 purposes.  
 18 If this order is enforced by a judgment of the United  
 19 States Court of Appeals the words in the notice reading  
 20 "Posted by order of the National Labor Relations Board"  
 21 shall read "Posted pursuant to a judgment of the United  
 22 States Court of Appeals enforcing an order of the National  
 23 Labor Relations Board."  
 24 The appendix shall read as follows:  
 25 "Notice to employees. Posted by order of the

168

1 National Labor Relations Board, an agency of the

2 United States Government. The National Labor  
 3 Relations Board has found that we violated the  
 4 National Labor Relations Act and has ordered us to  
 5 post and abide by this notice.  
 6 "Section 7 of the Act gives employees these  
 7 rights: To organize; to form, join or assist in a  
 8 union; to bargain collectively through  
 9 representatives of their own choice; to act together  
 10 for other mutual aid or protection; and to chose not  
 11 to engage in any of these protective concerted  
 12 activities.  
 13 "We will not promulgate or maintain a rule that  
 14 is illegally broad prohibiting employees from  
 15 engaging in solicitation or distribution at times  
 16 and/or at places where and when they are legally  
 17 permitted to engage in such activities.  
 18 "Signed the Riverboat Hotel," by an authorized  
 19 representative and dated with a title there. "This  
 20 is an official notice and must not be defaced by  
 21 anyone. This notice must remain posted for 60  
 22 consecutive days from the date of posting and must  
 23 not be altered, defaced or covered by any other  
 24 material. Any questions concerning this notice or  
 25 compliance with its provisions may be directed to

169

1 the Board's offices," followed by the Regional  
 2 office's address and telephone number in Oakland,  
 3 California.  
 4 That concludes my rendition of a bench decision. So  
 5 unless there's anything else I'll close this hearing.  
 6 MR. VELASTEGUI: There are a couple points I'd like to  
 7 bring up with respect to the order and conclusions of law  
 8 that you made, Your Honor.  
 9 With respect to the order, since the no solicitation  
 10 rule is contained in an employee handbook which has been  
 11 distributed to employees individually throughout the years  
 12 since 1988, I would ask Your Honor to reconsider and make  
 13 part of the order an order to take the following affirmative  
 14 actions; that's to notify all employees individually and in  
 15 writing with respect to the—either the change of the  
 16 invalid no solicitation rule or of the new solicitation  
 17 rule.  
 18 JUDGE HERZOG: That motion will be denied. However, to  
 19 the extent that it will be of assistance, I will require  
 20 that the notices be posted in English and in Spanish.  
 21 MR. VELASTEGUI: Okay. The other point I would draw  
 22 Your Honor's attention to, and I just may have missed this  
 23 and you can correct me if I did, but as part of your order  
 24 you said would cease and desist from and then you went into  
 25 language about maintaining an invalid law preventing

170

1 solicitation of any type. Did you also mention and  
 2 prohibiting the distribution of literature? I didn't hear  
 3 the distribution aspect in your order.  
 4 JUDGE HERZOG: Now I got to find my draft again. Hold  
 5 on a minute.  
 6 MR. VELASTEGUI: Sure.  
 7 (Pause.)  
 8 JUDGE HERZOG: Distribution was covered.  
 9 MR. VELASTEGUI: Okay. And then my last point has to do  
 10 with the notice that needs to be posted. You included the  
 11 "we will not" paragraphs, and I would ask—  
 12 JUDGE HERZOG: I inadvertently omitted the "we will  
 13 revoke and rescind" language which will be in there.  
 14 MR. VELASTEGUI: Okay. I just wanted to make that  
 15 clear.  
 16 JUDGE HERZOG: That was an oversight. And as I said,  
 17 the reason for the certification to occur roughly ten or  
 18 twelve days from now is to allow me to go back over and  
 19 clean up such things. I won't change my decision, but if I  
 20 see some errors such as that I will—of omission, I'll  
 21 correct it.

## APPENDIX C

## SUPPLEMENT TO BENCH DECISION

FREDERICK C. HERZOG, Administrative Law Judge. This matter was heard before me in Reno, Nevada, on May 18, 1995. At the close of the hearing, I delivered a bench decision, pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, which found that the Respondent has engaged in certain unfair labor practices. Inadvertently, the decision did not include in the Notice to Employees provision for the Respondent's illegal no-solicitation/no-distribution rule being revoked and rescinded. Nor did it provide for the Notice to Employees to be signed by Respondent and posted in both English and Spanish.

Accordingly, my bench decision is corrected as follows:

1. Insert on page 13, in line 22, after the word "notice," the following words: " , which shall be executed in both English and Spanish". . . .

2. Insert after page 15, line 17, "**WE WILL** rescind and revoke the illegal rule against solicitation contained in our Employee Handbook."

3. As was promised the parties, at page 140, the following citations are provided:

- *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793 (1945).
- *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1980);
- *Our Way, Inc.*, 268 NLRB 394 (1983).

## APPENDIX D

## NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE

## NATIONAL LABOR RELATIONS BOARD

## An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate or maintain a rule that is illegally broad prohibiting employees from engaging in solicitation or distribution at times and/or at places where and when they are legally permitted to engage in such activities.

WE WILL rescind and revoke the illegal rule against solicitation contained in our employee handbook.

THE RIVERBOAT HOTEL